Supreme Court
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No.: _____

In The

SUPREME COURT OF THE UNITED STATES

IN RE: FLORENCE HARVEY; ULYSSES GAUTHREAUX; LIONEL ALBERT; ERNESTINE ALBERT, AND ALL OTHER SIMILARLY SITUATED PERSONS, *Petitioner,*

v.

MOSAIC FERTILIZER, LLC, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari
Brief for Petitioners

Donna U. Grodner (20840)
Counsel of Record
GRODNER & ASSOCIATES
2223 Quail Run Drive, Suite B-1
Baton Rouge, Louisiana 70808
Telephone: (225) 769-1919 fax 769-1997
Counsel for Petitioner

QUESTIONS PRESENTED

I. **Does CAFA provide the exclusive grant of subject matter jurisdiction to federal district courts over state court putative class action litigations removed to a federal court after February 18, 2005?**

III. **If CAFA is not the exclusive grant of subject matter jurisdiction over state court putative class actions removed after February 18, 2005, may a state statute vest a federal district court with original subject matter jurisdiction?**

III. **If CAFA is the exclusive jurisdictional provision for state court putative class action litigations removed to federal court after February 18 2005, did Mosaic meet its burden of proof on removal?**

PARTIES TO THE PROCEEDING

The following individuals are parties to the proceeding in the court below:

Florence Harvey, Ulysses Gauthreaux, Lionel and Ernestine Albert: *Plaintiff-Appellant*;
MOSAIC FERTILIZER, LLC; *Defendant-Appellee*.

CORPORATION DISCLOSURE STATEMENT

Petitioners are not a corporation. Sup. Ct. R. 29.6.

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H. *Motion for Leave of Court to File Reply to Opposition to Motion to Remand* -
I. with attached *Reply to Opposition to Motion to Remand*; and
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PETITION FOR WRIT OF CERTIORARI

Petitioners, Florence Harvey, Ulysses Gauthreaux, Lionel and Ernestine Albert respectfully pray that a writ of certiorari be issued to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinions of the United States Fifth Circuit Court of Appeal (App. A) and the United States District Court for the Eastern District of Louisiana (App. A) are reported as follows:

In Re: Florence Harvey; Ulysses Gauthreaux; Lionel Albert; Ernestine Albert, and all other similarly situated persons, No. 07-30327 (5th Cir. 5/29/07)

Florence Harvey et al v. Mosaic Fertilizer, L.L.C., 06-9510, 2007 WL 861183 (E.D. La. 3/19/07)

JURISDICTION

The Judgment of the United States Fifth Circuit Court of Appeal was entered on May 29, 2007, (App. A). This Court has jurisdiction pursuant to 28 USC § 1254 (1).

STATUTES INVOLVED

The statute involved is 28 USC § 1332 (a) as opposed to (d).

CAUSE TO GRANT REVIEW ON CERTIORARI

Whether CAFA provides the exclusive grant of federal court subject matter jurisdiction over a removed state court putative class action after February 18, 2005, is an important question of federal law that has not been, but should be, settled by this Court.

Additionally, a finding that the state court statute, at issue here, provides a basis for federal court jurisdiction on removal is a finding on an important federal question that conflicts with relevant decisions of this Court.

This putative class action was removed from a Louisiana state court on the basis that Louisiana Code of Civil Procedure Article 595 creates federal subject matter jurisdiction pursuant to 28 USC § 1332 (a). See Ex C: *Notice of Removal*, at 2, ¶¶ 5-14. An alternative basis for jurisdiction cited was 28 USC § 1332 (d) "CAFA", § 1441 (a) and (b) and § 1453. See Ex C: *Notice of Removal*, at 4, ¶ 15.

In finding it had subject matter jurisdiction over this proposed state court class action litigation, the district court specifically relied upon 28 USC § 1332 (a), and Louisiana Code of Civil Procedure art. 595 to cumulate attorney fees to the claims of the proposed class representatives to find that at least one claim met the jurisdiction amount pursuant to 1332 (a).

The District Court further wrote, "**The court does not address Mosaic's alternative basis of jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332 (d)**." [Emphasis added] See Ex B: *Order and Reasons*, at 2, nt. 1. The district Court, thus, failed to apply CAFA Section 1453 or 1332 (d) to the removal of this action, which was error.

The lower courts erred in failing to find that removal of a class action from state court after February 18, 2005, is governed **exclusively** by CAFA - Section 1453 and Section 1332 Subpart (d). This is an important question of federal question, which this Court should settle.

Where Congress, through 2005 Acts, amended 28 USC § 1332 to add subpart (d) and added § 1453 [Class Action Fairness Act CAFA] to specifically address subject matter jurisdiction of the federal courts over class action litigation removed from state court after February 18,

2005, the District Court erred in failing to restrict its review of subject matter jurisdiction to those specific provisions.

Should this Court find that the District Court properly disregarded §§ 1453 and 1332 (d) in favor of §§ 1332 (a) and 1441 (a)(b), the District Court's reliance on La. C.C.P. art. 595 to establish federal subject matter jurisdiction was in error. In Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (11/5/02), this Court found that the All Writs Act, 28 USC § 1631, is not a separate grant by Congress of subject matter jurisdiction to the federal district courts. If the All Writs Act cannot be used as a basis for removal jurisdiction, then *a fortiori* a state statute may never be so used. Finding a state statute provides a basis for federal court jurisdiction was a decision on an important federal question which decision conflicts with a relevant decision of this Court and a recent Act of Congress.

28 USC §§ 1453 and 1332 (d) provides the exclusive jurisdiction of federal courts over putative class action litigations removed to federal court. Grant and its progeny did not survive the amendment to Section 1332, which, through subpart (d), specifically addresses the exclusive jurisdiction of the federal courts over state court class action litigation removed to federal court.

This action does not meet the jurisdictional minimum of CAFA and there are no claims before the district court, which meet the jurisdictional minimum for a federal court to assert subject matter jurisdiction over an action pursuant to 28 USC 1332 (a). Moreover, where this action could not have been originally filed in federal court, a federal court may not obtain jurisdiction on the basis of removal.

This Court should grant this application, review, render, reverse and remand this action to state court.

STATEMENT OF THE CASE

A. Factual Allegations

On or about October 11, 2006, workers at Mosaic "Faustina" Facility were processing product when hydrogen gas escaped and ignited resulting in a large explosion. Due to claims of property damages

associated with the explosion, this litigation followed.

The Plaintiffs, as proposed class representatives, filed a putative state court class action pursuant to La. C.C.P. art. 595 on behalf of the following:

THE CLASS:

> The proposed class consists of all persons who or which on October 12, 2006, were present and/or owned property in the effected vicinity in St. James Parish and who or which experienced fear and fright with property damages and/or minor medical treatment as a result of the explosion at the Mosaic Fertilizer, LLC, Faustina Plant.

The Plaintiffs prayed that the issue of liability be certified for class wide adjudication. The basis of liability pled against Mosaic is negligence including *res ipsa loquitur* and *respondeat superior.*

B. Procedural History

On October 12, 2006, *Class Action Petition for Damages* [1-2] was filed in St. James Parish, Louisiana. On November 3, 2006, *Notice of Removal* was filed removing the state court action to the Federal District Court in and for the Eastern District of Louisiana. [2] On November 21, 2006, *Motion to Remand (With Reservation)* and *Memorandum in Support of Motion to Remand (With Reservation)* was filed in the federal action. On January 15, 2007, *Opposition to Motion to Remand* was filed. On January 19, 2007, *Motion for Leave of Court to File Reply to Opposition to Motion to Remand* with attached *Reply to Opposition to Motion to Remand* was filed. On January 23, 2007, the District Court entered *Order Adjudicating Motion for Leave of Court to File Reply to Opposition to Motion to Remand* was filed. On March 19, 2007, the District Court entered *Order and Reasons* denying the motion to remand.

An application for issuance of a writ of mandamus followed, which was denied by the Fifth Circuit on May 29, 2007.

C. Action of the trial court

The District Court for the Eastern District of Louisiana failed to apply 28 USC § 1332 (d) and § 1453, which provides exclusive jurisdiction of the federal courts over putative state court class action litigation both filed and removed to federal court after February 18, 2005, and, instead, applied the general jurisdictional provision found in 28 USC §§ 1332 (a) and 1441 (a)(b). The District Court further found that a Louisiana state statute provided a basis for federal court jurisdiction. These rulings were legally erroneous.

D. Action of the Fifth Circuit Court of Appeals

On a timely application for a writ of mandamus from the United States Fifth Circuit Court of Appeals, on May 29, 2007, the Fifth Circuit issued a judgment denying the writ application.

E. Basis for jurisdiction of the Fifth Circuit

The stated basis for jurisdiction was as follows:

> The jurisdiction of this Court [Court of Appeals] is founded in the Constitution of the United States Article III, to test the subject matter jurisdiction of the federal courts over the action herein. See also, 28 U.S.C. § 1447 (c) ("If at anytime before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.")

Here, an appeal to the Fifth Circuit did not lie, because the District Court in its ruling applied 28 USC § 1441 (a) and Section 1332 (a) rather than Section 1453 and 1332 (d); thus, mandamus remained the appropriate vehicle for the remand of this action.

Technically, one could argue that if this Court were to find that the lower courts erred in applying §§ 1331 (a) and 1441 (a)(b), an appeal, rather than a writ application, would have been the appropriate remedy for review by a court of appeal pursuant to § 1453 [CAFA],

but, as stated above, the ruling of the District Court, rather than argument of Petitioners, creates the basis for review. Here, the ruling did not address CAFA, except to mention that it was not addressed.

REASONS FOR GRANTING THE PETITION

Issue: ***Does CAFA provide the exclusive grant of subject matter jurisdiction to federal district courts over state court putative class action litigations removed to a federal court after February 18, 2005?***

Here, the District Court wrote, "The court does not address Mosaic's alternative basis of jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332 (d)." See Ex B: *Order and Reasons*, at 2, nt. 1. Rather than apply CAFA, the District Court instead applied 28 USC § 1441 (a)(b) and 1332 (a) and, thus, failed to apply CAFA Section 1453 or Section 1332 (d) to the removal of this action, which was in error.

Whether removal of a class action filed in state court after February 18, 2005, is governed **exclusively** by Section 1453 and Section 1332 Subpart (d) is an important question of federal law that has not been addressed by this Court.

The HISTORICAL AND STATUTORY NOTES addressing the enactment of CAFA, § 1332 (d), provide the following:

> 2005 Acts. Publ.L. 109-2, § 9, Feb. 18, 2005, 119 Stat. 14, provided that: "The amendments made by this Act [the Class Action Fairness Act of 2005, which enacted this note and 28 U.S.C.A. §§ 1453 and 1711 to 1715, amended 28 U.S.C.A. §§ 1332, 1335, and 1603, and enacted provisions set out as notes under 28 U.S.C.A. §§ 1711, 2071, and 2074] **shall apply to any civil action commenced on or after the date of enactment of this Act [Feb. 18, 2005].**" [Emphasis added]

Similarly, the HISTORICAL AND STATUTORY NOTES addressing the enactment REMOVAL OF CLASS ACTIONS provide the following:

> 2005 Acts. Amendments by Class Action Fairness Act of 2005, Publ.L. 109-2, Feb. 18, 2005, 119 Stat. 4, **applicable to any civil action commenced on or after Feb. 18, 2005**, see Publ.L. 109-2, § 9, set out as a note under 28 U.S.C.A. § 1332. [Emphasis added]

Where Congress used the mandatory "shall" and this action was filed on October 12, 2006, the District Court was statutorily limited by an Act of Congress to applying CAFA to this action, because this action was "**filed under** rule 23 of the Federal Rules of Civil Procedure or **similar State Statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action**." [Emphasis added] See, Subpart (d)(1)(B).[1]

Subpart (d)(2)(C) provides that "[A] district court shall have original jurisdiction of any civil action in which the **matter in controversy exceeds the sum or value of $5,000,000,** exclusive of interest and costs, and is a class action in which - . . . ." Thus, where Mosaic, the defendant removing party, was unable to meet it burden of proof on removal under CAFA, this action should have been remanded for lack of subject matter jurisdiction.

Besides the congressional statutory mandate, a fundamental rule of statutory interpretation, which requires no authority, is that where there are two or more statutes, the specific supersedes the general.[2]

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[1] See also, Patterson v. Dean Morris, L.L.P., 448 F.3d 736, 739 (5th Cir. 2007)("CAFA provides for original jurisdiction in federal courts of certain class actions 'commenced on or after the date of enactment,' which is February 18, 2005.")

[2] See, Syngenta, infra, 537 U.S. at 32. ("'[w]here a statute specifically address the particular issue at hand, it is that authority, and not the All Writ Act, that is controlling.'" citing, Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34, 41,

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Here, CAFA provides a specific and limited grant of subject matter jurisdiction over "class actions" filed and removed from state court after February 18, 2005.

Mosaic, however, argued in District Court, "Plaintiffs cite no authority whatsoever for the argument that CAFA is now the "exclusive" basis for federal court jurisdiction over class actions. Traditional diversity jurisdiction under 28 USC § 1332 (a) still exits." Ironically, Mosaic cited no authority for its position that CAFA, which is specific to "class action" does not apply, and, that, instead, the general provisions of Section 1332 (a) still apply post-CAFA to "class actions" and survive the CAFA.

Thus, the District Court erred in failing to apply CAFA to this Action. This Court should determine whether Sections 1441 (a)(b) and 1331 (a) still apply to putative class actions removed from state court.

Had the District Court applied CAFA, besides the jurisdictional minimum of $5M found in (d)(2), 28 USC § 1332 (d)(6) would have applied to this action and provides as follows:

> (6) In any class action, **the claims of the individual class members shall be aggregated** to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

Under CAFA, the District Court could not have applied Grant, discussed below, to aggregate any "substantive discretionary" award of attorney fees and costs solely in the claims of the few class representatives. Subpart (6) abrogates Grant by requiring that the "claims of the individual class members shall be aggregated."

The District Court erred in failing to apply CAFA to this post-CAFA state court putative class action. Moreover, as discussed below, under CAFA, Mosaic failed to meet its burden of proof. This Court should review this matter, and this action should be remanded

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106 S.Ct. 355, 88 L.Ed.2d 189 (1985).)

to state court.

Issue: ***If CAFA is not the exclusive grant of subject matter jurisdiction over state court putative class actions removed after February 18, 2005, may a state statute vest a federal district court with original subject matter jurisdiction?***

If this Court were to find that CAFA is not the exclusive jurisdictional statute governing the removal of putative state court class action to a federal district court after February 18, 2005, the trial court erred in finding that original subject matter jurisdiction in federal court may arise out of a state court procedural statute.

Where this Court has answered a similar question regarding the All Writs Act in the negative (All Writs Act does not provide a separate grant of original subject matter jurisdiction to support removal), this Court should grant review of the lower court rulings where the lower courts have decided an important federal question in a way that conflicts with a relevant decision of this Court and a recent Act of Congress.

This Court has never considered the affect of CAFA on the general jurisdictional statutes. This Court has never considered the affect of Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (11/5/02), on Grant v. Chevron, 309 F.3d 864 (5th Cir. 10/11/02), cert denied, 538 U.S. 945, 123 S.Ct. 1631, 148 L.Ed.2d 486 (2003), a Fifth Circuit opinion which allows a state court procedural statute to form the basis for original subject matter jurisdiction on removal of putative state court class action from a Louisiana state court.

Syngenta involved a Louisiana state court products liability action which was removed to the Middle District of Louisiana and then transferred to the Southern District of Alabama where a national settlement was pending. As a basis for original subject matter jurisdiction the transferror court relied upon the All Writs Act and Supplemental Jurisdiction to exercise federal subject matter jurisdiction over the action. The decision of the Eleventh Circuit to reverse and remand was unanimously affirmed by this Court, which, through Chief Justice Renhnquist, wrote, 123 S.Ct. at 369:

> The court [Eleventh Circuit] reasoned that § 1441 by its terms authorizes removal only of actions **over which the district courts have original jurisdiction.** [Emphasis added]

This Court further explained, 123 S.Ct. at 370, as follows:

> The general removal statute, 28 USC § 1441, provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending," **unless Congress specifically provides otherwise.** § 1441 (a). **Under the plain terms of § 1441 (a), in order properly to remove the Henson action pursuant to that provision, petitioners must demonstrate that original subject-matter jurisdiction lies in the federal courts**. They concede that **the All Writs Act "does not, by its specific terms, provide federal courts with an independent grant of jurisdiction.**" Brief for Petitioners 9; see also Clinton, 526 U.S., at 534-535, 119 S.Ct. 1538 (express terms of the All Writs Act confine a court "to issuing process in aid of its existing

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> statutory jurisdiction; the Act does not enlarge that jurisdiction"). **Because the All Writs Act does not confer jurisdiction on the federal courts, it cannot confer the original jurisdiction required to support removal pursuant to § 1441.** [Emphasis added]

If the All Writs Act does not qualify as an Act of Congress that vests original jurisdiction in the federal courts, then *a fortiori*, a state statute, La. C.C.P. art. 595, cannot.

Here, where the Louisiana Class Action Statutes La. C.C.P. art. 595, neither can, nor does, provide federal courts with an independent grant of subject matter jurisdiction, the state statute cannot confer the original jurisdiction required to support removal pursuant to § 1441.[3] "Section 1441 requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court." Syngenta, 123 S.Ct. at 371. Syngenta explains that § 1441 cannot provide original jurisdiction to an action which could not have been originally instituted in a federal court. Although a court may look at the value of the action at the time of removal, it must determine the value of the case under federal law **as though the action had been originally filed in a federal district court**.

A federal district court would have had no subject matter jurisdiction over this action had it been originally filed in federal court, because the claim of each named Plaintiff does not meet the jurisdictional minimum. Moreover, the Plaintiffs could not have invoking a Louisiana procedural statute as a basis to vest the federal court with original subject matter jurisdiction. According to Syngenta, if the case could not have been originally filed in federal court, such a case cannot be removed to federal court. To the extent Grant was not

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[3] "The third article of the Constitution declares that 'the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish.'" Sheldon v. Sill, 8 How. 441, 12 L.Ed. 1147 (U.S. 1850).

abrogated by CAFA, review on certiorari should be granted by this Court and Grant should be reconsidered in light of Syngenta as well as Louisiana Code of Civil Procedure Article 4, discussed below.

This Court's analysis set forth in Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (**11/5/02**), should not be ignored in this case, simply because this Court did not discuss Grant v. Chevron, 309 F.3d 864 (5th Cir. **10/11/02**), which decision **predates** Syngenta **by one month**. The rendering of Grant and Syngenta is near contemporaneous and neither case mentions the other. Additionally, although this Court made no mention of Grant, Syngenta still impacts Grant and the present lawsuit,[4] because Syngenta redirects the analysis of removed actions.

Through Grant, the Fifth Circuit instructed its district courts to determine the amount in controversy at the time of removal but while the action was in state court, i.e., **what was the value of the case while in state court?** To assess the value of a Louisiana class action, while it was in state court, in Grant, the Fifth Circuit relied upon a Louisiana procedural article, **which, once the action was in federal court, may no longer be applied.** According to Syngenta, if the state court procedural statute would not apply had the action been originally filed in federal court, it will not apply to a district court's analysis of subject matter jurisdiction on removal. Such is the case with La. C.C.P. art. 595, which provides, as follows:

> A. The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or

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[4] There is neither a Supreme Court nor Fifth Circuit rule which states that to impact an earlier decision of a lower court, the decision of a higher court must specifically discuss or mention that case.

compromise is had which is beneficial, to the class.

Through Syngenta, this Court instructed that the proper analysis for district courts to follow is whether at the time of removal the action could have been originally filed in a federal district court. The proper question, thus, is **what is the value of the case had it been originally filed in federal court?**

Syngenta directs the district courts to make a determination of subject matter jurisdiction with the assumption that the action had been originally filed in federal court.

The greater issue, raised by Syngenta's implicit impact on this case, is whether Grant vests the Louisiana Legislature with the authority under the United States Constitution to enact procedural statutes that vest federal district courts with original subject matter jurisdiction. If Louisiana's procedural statutes in any manner govern an action for diversity purposes once in federal court, then the federal district courts would also be bound by Louisiana's subject matter jurisdictional statutes, including Louisiana Code of Civil Procedure article 4, which provides as follows:

> When the jurisdiction of a court over the subject matter of an action depends upon the amount in dispute, or value of the right asserted, it shall be determined by the amount demanded, including damages pursuant to Civil Code Articles 2315.3 and 2315.4, or value asserted in good faith by the plaintiff, **but the amount in dispute does not include interest, court costs, attorney fees, or penalties, whether provided by agreement or by law.** [Emphasis added]

Thus, if it were constitutionally permissible for a federal district court to look to a Louisiana procedural statute as a basis to determine the value of a case (**while it was in state court**) for the purposes of original federal diversity jurisdiction, according to Louisiana law on subject matter jurisdiction, the award of attorney fees or costs to the class representatives **may not** be considered

when determining the value of the case.

But, the more interesting point raised by La. C.C.P. art. 4 is the contrast in questions posed by Grant **(what was the value of the case while in state court?)** and by Syngenta (**what is the value of the case in federal court?**), because according to Article 4, a Louisiana State Court could not consider a possible award of attorney fees or costs in determining the value of a case.

Implicitly, the Fifth Circuit's analysis in Grant grants the Louisiana Legislature with a power vested only in Congress. What if the Louisiana Legislature amended La. C.C.P. art. 4 to provide that any cases filed in the State of Louisiana district court against a foreign defendant will be presumed to be valued greater than 75,000.00? Would every Louisiana case involving a foreign defendant be removable? Under Grant, the answer is yes. Under Syngenta, the answer is no, because a state statute cannot vest a federal court with subject matter jurisdiction. The constitutional underpinnings of the Syngenta analysis trump that of Grant.

In Syngenta, this Court found that since the All Writs Act was not a specific grant, by Congress, of original subject matter jurisdiction to the federal district court, thus, the All Writs Act could not be used as a basis for jurisdiction on removal pursuant to § 1441. Here, certainly, Louisiana's Class Action Statute cannot form a basis to vest a federal district courts with original subject matter jurisdiction. Thus, the analysis or approach utilized by the Fifth Circuit in Grant[5] should be reevaluated in light of Syngenta.

In Syngenta, the plaintiff could not have originally filed this action in federal court and pled the All Writs Act or Supplemental Jurisdiction to vest a federal district court with original subject matter jurisdiction.

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[5] Considering La. C.C.P. art. 4, Free v. Abbott Laboratories, 164 F.3d 270 (5th Cir. 1999), aff'd by equally divided court, 529 U.S. 333, 120 S.Ct. 1578, 146 L.Ed. 2d 306 (2000), the underpinnings of Free may also be at issue.

Explaining, Chief Justice Renhnquist, wrote, 123 S.Ct. at 369:

> **Because the All Writs Act does not confer jurisdiction on the federal courts, it cannot confer the original jurisdiction required to support removal pursuant to § 1441.** [Emphasis added]

Here, because a Louisiana procedural statute, which could not have been invoked in an original filing in federal court, may never confer jurisdiction on a federal court, the same Louisiana law cannot confer original jurisdiction required to support removal.[6] Again, **if the Plaintiffs could not have filed a complaint and pled Louisiana Procedural Statutes as a basis to vest a federal district court with original subject matter jurisdiction, then the statute cannot support removal.**[7]

If the All Writs Act cannot form a basis for original jurisdiction, then, *a fortiori*, a state statute may never do so.

In view of Syngenta, Grant is an unprecedented and unconstitutional grant of power to the Louisiana Legislature.

The final question before this Court is, if Grant

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[6] Because this is a diversity case, the Rules of Decision Act, 28 U.S.C. § 1652, and Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 822-23, 82 L.Ed. 1188 (1938), with its seeming constitutional underpinning, mandate that the substantive law applied be that of the relevant state, and procedural rules of the federal courts, apply.

[7] In 2003, Congress amended FRCP 23 to add subpart (g) and (h) specifically addressing class counsel and attorney fees awards in actions certified as a class action in federal court.

correctly found that the proper inquiry is what was the value while in state court and that Louisiana class action statute creates a substantive right vested in a class representative, what happens to subject matter jurisdiction once class certification is denied by a federal court?

Once certification is denied, there will no longer be any claim for attorney fees to cumulate to any class representative to meet any jurisdictional minimum for any claim. Subject matter jurisdiction cannot be illusory.

Even in Grant, 309 F.3d at 873, the Fifth Circuit reiterated that "Abbott[8] confirms that **when** the federal court **has jurisdiction over at least one member of the class** by virtue of (1) diversity of citizenship and (2) a sufficient jurisdictional amount, that court has supplemental jurisdiction over all diverse class members, including those whose claims fall short of § 1332's amount-in-controversy threshold."[9] Thus, where subject matter jurisdiction is illusory (based solely upon a state procedural statute that will not apply in federal court), remand/dismissal is inevitable.

According to Grant, in an action filed as a Louisiana class action, the class representatives "may" have what the Fifth Circuit described as a "discretionary" substantive right[10] to cumulate attorney fees and cost in their recovery; thus, increasing the value of each of the class representative's claims to greater than $75,000. According to Grant, this discretionary substantive right is not extinguished on removal or where the action is certified under FRCP 23, the right is maintained. In view of the enactment of FRCP 23 (h), which specifically addresses attorney fees in "an action certified as a class action" this section of the Grant analysis has been abrogated by positive law.

Thus, once a district court finds that class certification under FRCP 23 is improper and denies

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[8] Referencing, Free v. Abbott Laboratories, 164 F.3d 270 (5th Cir. 1999), aff'd by equally divided court, 529 U.S. 333, 120 S.Ct. 1578, 146 L.Ed. 2d 306 (2000).

[9] See, Cradle v. Monumental Life Ins., Co., 354 F. Supp.2d 632 (E.D. Va. 2005), discussing and comparing state court statutes allowing awards of attorney fees.

[10] A "discretionary substantive right" may be a contradiction in terms known as an oxymoron.

class certification, the discretionary right, *vel non*, recognized by Grant is extinguished. Once the right to cumulate attorney fees and costs in the claim of a class representative is extinguished, then the value of those claim(s) must independently meet the jurisdictional minimum under Acts of Congress relating to federal subject matter jurisdiction.[11] 28 USC § 1332 (d)(11)(B)(i), provides, "[T]he term "mass action" means any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)."

Additionally, 28 USC § 1332 (11)(B)(ii)(I) provides as follows: "As used in subparagraph (A), the term 'mass action' shall not include any civil action in which - all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State." Here, all injuries occurred in the State of Louisiana.

If, other than the Louisiana Class Action statute, there is no independent basis for diversity jurisdiction, once class certification is denied, this action would require remand. 28 USC Section 1447 (c). Such analysis demonstrates the error of applying Grant, rather than CAFA, to this case.

The federal courts lack jurisdiction over this action.

"If, however, the court lacked jurisdiction both at the time of removal and judgment, the judgment cannot

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[11] See 28 USC § 1332 (d)(11)(B)(i), which provides, "[T]he term "mass action" means any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)."

stand. 'Despite a federal trial court's threshold denial of a motion to remand, if, at the end of the day and case, a jurisdictional defect remains uncured, the judgment must be vacated.'" H&D Tire and Automotive-Hardware, Inc. v. Pitney Bowes Inc., 227 F.3d 326 (5th Cir. 2000), quoting, Caterpillar Inc. v. Lewis, 519 U.S. 61, 76-77 (1996).

Here, when the District Court elected to disregard Section 1453 and 1332 (d), the District Court further erred when it failed to analyze subject matter jurisdiction as though this action had been originally filed in a federal district court. This action should be remanded.

Issue: ***If CAFA is the exclusive jurisdictional provision for state court putative class action litigations removed to federal court after February 18, 2005, did Mosaic meet its burden of proof on removal?***

On this issue, Petitioners request that this Court review and render.

Where Mosaic could not adequately argue the application of Section 1453 and 1332 (d), and made no evidentiary showing that this action meets the CAFA jurisdictional minimum of $5M. Because Mosaic could not meet it burden under CAFA, it invoked pre-CAFA law, which the District Court erroneously adopted.

In Miedema v. Maytag Corp., 450 F.3d 1322 (11th Cir. 2006), Maytag, as the manufacturer of certain ranges and ovens, was sued in state court in a consumer class action under state law which action was removed to federal court under Class Action Fairness Act (CAFA). The original suit filed in state court alleged there were "thousands of members of the above-described class."

In support of its removal, Maytag offered the affidavit of its information analyst that there were a total of 6,729 ranges/ovens in Florida with the model numbers of those with the allegedly defective motorized door latch assembly and that the total value of those 6,729 ranges/ovens was $5,931,971.

After filing a motion to remand, the Plaintiff was allowed a discovery deposition and allowed to then submit the discovery to supplement its motion to remand to show that Maytag failed to carry its burden of proof by a preponderance of the evidence on the jurisdictional minimum to establish that more than $5,000,000 was in controversy.

Maytag argued that the burden proof on remand was on the Plaintiff to prove that jurisdictional amount was not met (proving a negative) citing and quoting from a Senate Committee Report directed to the CAFA. The Eleventh Circuit rejected Maytag's argument and held

that Maytag, as the removing party, bore the burden of proof by a preponderance of the evidence on the motion to remand to establish the jurisdictional amount.

The Eleventh Circuit in Miedema first cited the rule: "Under CAFA, federal courts have original jurisdiction over class actions in which the amount in controversy exceeds $5,000,000 and there is minimal diversity (at least one plaintiff and one defendant are from different states)." Miedema, 450 F.3d at 1327, citing, Evans v. Walter Indus. Inc., 449 F.3d 1159, 1163 (11th Cir. 2006). The Eleventh Circuit then cited both a Seventh and Ninth Circuit opinion that rejected the suggestion found in the Senate Committee Report that the burden of proof be on the nonremoving party. The cases cited were Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (holding that CAFA's "naked legislative history" does not alter the well established rule that proponent of subject matter jurisdiction bears the burden of persuasion on the amount in controversy), and Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 686 (9th Cir. 2006) ("CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction.")

The Eleventh Circuit then cited its own precedent, Evans v. Walter Indus. Inc., 449 F.3d 1159, 1164 (11th Cir. 2006), holding, "CAFA does not upset the traditional rule that the removing party bears the burden of proof with regard to establishing federal court jurisdiction."

For these reasons, the Eleventh Circuit found that the removing party bares the burden of proving the jurisdictional minimum by a preponderance of the evidence. The Eleventh Circuit also found that any doubts about the amount in controversy should be resolved in favor or remand and a finding of a lack of jurisdiction. Miedema, 450 F.3d at 1329, citing, Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941) ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [removal statutes]." Syngenta Crop. Prot., Inc. v. Henson, 537 U.S. 28, 32 123 S.Ct. 366, 369, 154 L.Ed.2d 368 (2002) ("[S]tatutory procedures for

removal are to be strictly construed."); Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994) ("[R]emoval statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand."); Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 411 (11th Cir. 1999) ([A]ll doubts about jurisdiction should be resoled in favor of remand to state court.").

On October 12, 2006, this suit, as captioned above, was filed in the 23rd Judicial District Court in and for the Parish of St. James, State of Louisiana, bearing docket number 31350. This suit filed originally in state court alleges that the damages for the entire class do not exceed $5M and that the individual property damage and medical claims associated with the explosion do not exceed $50,000 each. No jury was requested due to the jurisdictional restrictions in state court to obtain a jury. Louisiana Code of Civil Procedure Article 1732 (1).

In order to establish the amount in controversy, Mosaic relied upon the Plaintiffs' Petition which states that there are 200 putative class members. Mosaic argued that the amount in controversy "for at least one plaintiff" exceeds $75,000.00 exclusive of interest and costs. Rather than make any effort to show that this action meets CAFA's jurisdictional minimum, Mosaic instead relied upon Section 1332 (a) a general jurisdiction statute, which this Court should find to be inapplicable to putative class actions removed from state court.

Mosaic erroneously averred that even though this litigation is a state court class action sought to be removed to federal court, it need not meet CAFA, and it suggested, however erroneously, that the amount in controversy for a class action is met, through 28 USC § 1332 (a), because attorneys' fees and costs that may be awarded under Louisiana Code of Civil Procedure art. 595, in state court, may be attributable to the three named class representatives, which according to Mosaic rendered the amount in controversy on each of these claims in excess of $75,000 and thereby establishes jurisdiction over this class action.

The District Court adopted the rationale that a state statute may provide a basis for federal court subject matter jurisdiction and that pre-CAFA law

applies, citing, Grant v. Chevron Phillips Chemical Co., L.P., 309 F.3d 864 (5th Cir. 2002), seven times in a three page ruling.

This Court should find that rationale of Grant is abrogated by the 2005 Acts ("**matter in controversy exceeds the sum or value of $5,000,000**"). Even if Grant were not abrogated, there is good cause to review that decision and its rationale, as discussed above in the discussion of Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed.2d 368 (11/5/02).

Thus, this Court should find that the removing party, here Mosaic, had the burden of proving that the aggregate value of this litigation is in excess of $5,000,000 and not that any class representative's claim is worth $75,000 by aggregating attorney fees with the claims of the class representatives.

Mosaic, attempting to shift its burden of proof on removal, argued that the Plaintiffs are required to enter into a stipulation as to the value of the case. The CAFA does not require such and the burden of proof, as shown above, on the jurisdictional amount is on Mosaic.[12] Mosaic, itself, could have entered such a stipulation, but chose not to do so. Additionally, although it was not Petitioner's burden of proof, Petitioners offered to conduct discovery solely on the jurisdictional amount. Ex F. The District Court did not address the request for discovery.

Mosaic incorrectly averred that the present class action is for fear and fright, yet, the Petition clearly states that it is limited to property damage, fear and fright claims associated with the property claims and to those rare persons with personal injuries associated with explosion. The putative class has not averred that breathing hydrogen or the products of its combustion are associated with personal injury or fear and fright.

Mosaic next averred that because the claims arise in St. James Parish that the Plaintiffs have thereby alleged that the entire Parish was damaged. Mosaic's characterization of the Petition is unfounded. The distance that the shock wave traveled through the ground and where it traveled is unknown at this time. Precertification discovery is necessary on this issue to properly define the class.

This Court should find that the removing defendant had the burden of proof and failed to meet its burden of proof under CAFA.

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[12] See Ray Mart, Inc. v. Stock Building Supply of Texas, 435 F. Supp. 2d 578, 585-586 (E.D. Tex. 2006), and cases cited and discussed therein.

CONCLUSION

For the reasons set forth herein, the foregoing Petition for Certiorari should be granted. **This Court should review, render and remand this action to state court.**

Respectfully submitted,

Donna U. Grodner,
Counsel of Record
GRODNER & ASSOCIATES
2223 Quail Run Drive, Suite B-1
Baton Rouge, Louisiana 70808
Telephone: (225) 769-1919
Facsimile: (225) 769-1997
Counsel for Petitioner